Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2614

Appeal PA06-346

University of Toronto

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NATURE OF THE APPEAL:

The University of Toronto (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> …copies of all sexual harassment complaints filed with the University between 2004 and present with all personal information removed. I'm requesting the original hand-written or typed complaints and all records of the University's handling and resolution of the cases such as any internal reports, disciplinary actions, expulsions or court actions. As well, I request any summary data on sexual harassment at the University for the same time frame including, but not limited to, statistics or listings of incidents and the results of investigations.

The requester also noted that:

> I'm aware that the records will likely contain personal information which is exempt under the law. I do not contest access to such information and ask that it be severed.

At the request stage, staff from the University's Freedom of Information and Protection of Privacy Office and the Sexual Harassment Office discussed the request with the requester, who subsequently narrowed the scope of his request to include only the records relating to the resolution of the complaints and for the Annual Reports of the University's Sexual Harassment Office posted for the last two years.

The University issued a decision letter stating that the four most recent Annual Reports of the Sexual Harassment Office were publicly available on the University website. In the letter, the University denied access to 45 one-page records of resolution relating to complaints involving staff and/or faculty, stating that:

> [u]nder section 65(6), [the *Act*] does not apply to the records of resolution for matters involving staff and/or faculty. Such records are communications about labour relations or employment-related matters in which the University has an interest.

The University also denied access to 45 one-page records of resolution respecting matters in which staff and/or faculty were not involved, stating that:

> [t]he disclosure of these records would constitute an unjustified invasion of personal privacy under section 21 of [the *Act*], and could reasonably be expected to seriously threaten the safety or health of individuals as contemplated in section 20 of [the *Act*].

The University also addressed the possibility of severing the records in which staff and/or faculty were not involved, but noted that:

> [i]t is the University's decision that it is not possible to sever these records in a reasonable manner because the details of settlement in records of resolution speak

> to unique circumstances and solutions for each particular matter. In the close-knit University community, apparently trivial or innocuous details could identify parties or situations to colleagues or peers and could expose parties who entered into a settlement with explicit assurances of confidentiality to risk of harm, particularly to their health and emotional well-being.

The requester, now the appellant, appealed this decision.

During mediation, the appellant confirmed that he obtained the University's Annual Reports and is no longer pursuing access to these records. Also during mediation, the appellant raised the possible existence of a compelling public interest in the disclosure of the records at issue, within the meaning of section 23 of the *Act*. As no other mediation was possible, the file was transferred to me to conduct an Inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the University, initially. I received representations from it. I then sent a Notice of Inquiry to the appellant, along with the University's representations, seeking his representations. The curriculum vitaes that accompanied the University's representations were not disclosed to the appellant because of my concerns about their confidentiality. I also received representations from the appellant, which were shared with the University. I then sought and received reply representations from the University.

RECORDS:

The records consist of:

a) 45 one-page records of resolution relating to complaints involving faculty and/or staff; and

b) 45 one-page records of resolution which do not relate to complaints involving faculty and/or staff.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The University has claimed that section 65(6)3 excludes the first category of records, comprised of 45 one-page records of resolution relating to complaints involving faculty and/or staff, from the *Act*. In particular, it claims that the records were collected, prepared, maintained or used in relation to employment-related matters in which the University has an interest. The University submits that:

> …all University employees are subject to the University's Sexual Harassment Policy as a condition of employment. The 45 records referred to above were generated as part of a mediation process that is an integral component of the complaint process under the Sexual Harassment Policy. Moreover, it is not

> unusual for records of resolution to contain specific terms that have an employment-related aspect.

Section 65(6)3 states:

> Subject to subsection (7), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6)3 applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part 1: collected, prepared, maintained or used

The appellant submits that the records should not be excluded from the *Act*. He claims that part 1 of the test has not been met as:

> …a "record of resolution" is framed by the parties. It is not, therefore, a record that is collected, prepared, maintained or used by the Sexual Harassment Office of the University of Toronto. Rather, it is collected, prepared, maintained or used by the "parties" -- which necessarily includes the complainant.

He also disputes that these records were "collected, prepared, maintained or used in relation to consultations, discussions or communications." He submits that:

> …when a complaint of sexual harassment is received by the Sexual Harassment Office, the office does consult, discuss or engage in communications with others in the course of investigating the complaint. However, this does not mean that the

> responsive records themselves were collected, prepared, maintained or used in relation to consultations, discussions or communications. These records represent the end point of the investigation into the sexual harassment complaint.

In reply, the University submits that:

> The fact that the content of the records themselves is "framed" by the parties is irrelevant. The content of the mediated resolution, and thus the "framing" which is then recorded, comes from the parties. But that content is then supplied, in confidence, to the Sexual Harassment Officer who collects it, prepares a document recording it in suitable form, maintains the resulting record as a formal statement of what the parties have agreed to do, and then uses it to ensure that, in the event of a dispute or for compliance monitoring purposes, it is clear what the parties (and in some instances the University itself) have committed to.

Analysis/Findings

Based on the representations of the parties and on my review of the records themselves, I find that the University's Sexual Harassment Office collected the records, which reflect the mediated resolutions of sexual harassment complaints. This office then maintained these records. The Sexual Harassment Office is also called upon to use these records, when need be, in the monitoring of the resolution reflected in the records.

Accordingly, I conclude that the University has satisfied the first part of the three-part test.

Part 2: meetings, consultations, discussions or communications

The appellant submits that part 2 of the test has also not been met. He submits that with the preparation of the records, there will be no further meetings, consultations, discussions or communications. He quotes from one of the University's supporting affidavits, as follows:

> The resolution of a complaint in mediation is recorded in a record of resolution that is framed by the parties. The record of resolution represents the end of the complaint process. It often expresses this finality in emphatic terms. Both complainant and the respondent are assured that the record will be held only in the Sexual Harassment Office, that it is completely confidential, and that it will be produced only under the operation of law. These are the types of records that are in issue in the present appeal.

In reply, the University submits that there are meetings, consultations, discussions and communications about the sexual harassment complaint, including, but not limited to, the mediation meetings held pursuant to the Sexual Harassment Policy. It submits that:

> The concept of maintenance means that if the records, once generated, reside in one Office, and are not transmitted further or used further (other than in the case of compliance issues), that factor does not change the reality that they are "maintained". The individual factors in the list are disjunctive…

Analysis/Findings

Based on the representations of the parties and on my review of the records themselves, I find that the University's Sexual Harassment Office collected, maintained or used the records in relation to meetings, discussions or communications. In particular, the records were prepared, and then collected, following mediation meetings or discussions. The University then maintained these records.

Accordingly, I conclude that the University has satisfied the second part of the three-part test.

Part 3: labour relations or employment-related matters in which the institution has an interest

The appellant submits that part 3 of the test has also not been met as the records were not about labour relations or employment related matters. He relies on the decision of former Assistant Commissioner Tom Mitchinson in Order P-1223 that the words "in relation to" require that there be a substantial connection between the meetings, consultations, etc. and labour relations or employment-related matters.

The appellant claims that there is no "substantial connection" between the records and labour relations or employment matters as the records will be held in the Sexual Harassment Office and will only be produced under operation of the law. He submits that:

> There is no evidence that the Sexual Harassment Office is responsible for, or involved in labour relations or employment-related matters of faculty and/or staff. To the contrary, one would expect that the mandate of the Sexual Harassment Office is limited to investigating and resolving complaints of harassment. The webpage for the University of Toronto's Sexual Harassment Office …describes its role as follows:
>
> > The role of this office is to provide information and assistance to all members of the University of Toronto community - staff, students, and faculty. The Sexual Harassment Officer offers counsel to both people involved in a complaint, makes referrals to appropriate University or community resources, explains the details of the formal complaint process, provides mediation, and administers formal complaints. If you decide not to make a formal complaint, the Sexual Harassment Officer can suggest other ways to resolve a situation.

Sexual harassment by faculty or staff may very well be a matter relating to employment or labour relations. However, there is no evidence that the work of the University of Toronto's Sexual Harassment Office is related in any way to this aspect of sexual harassment.

There is also no evidence that the Sexual Harassment Office transferred the responsive records (i.e. records of resolution) to a person or office at the University of Toronto that is responsible for labour relations or employment-related matters…

The details of a sexual harassment complaint involving faculty or staff may be discussed in the course of meetings, consultations, discussions or communications that relate to labour relations or employment related matters. However, this does not mean that the responsive records themselves were collected, prepared, maintained or used in those meetings…

In addition, even if the Sexual Harassment Office of the University of Toronto deals with labour relations or employment related matters - which I expressly dispute - any meetings etc. relating to tenured faculty cannot relate to labour relations or employment related matters. This is because tenured faculty are not employees. Those faculty who have secured tenure have a status which is simply not that of an employee...

[T]he records of resolution - represent the end of the complaints process. Accordingly, it cannot be said that the University of Toronto has an "interest" in the matter as required under s. 65(3). In …Order MO-1433-F, Assistant Commissioner Mitchinson defined "interest" as follows:

> An "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Police have an interest must have the capacity to affect the Police's legal rights or obligations (see Orders M-1147 and P-1242). Furthermore, there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has the requisite interest. ...

With the preparation of the record of resolution, the University simply has no further "interest" in the matter of the sexual harassment complaint. The complaint is at an end.

In reply, the University submits that the collection of the records was in relation to employment-related matters; as was the preparation, maintenance and use. It states that:

> …[T]enured faculty are employees of the University and are treated as such for all legal purposes, including with respect to income tax.
>
> …[T]here is indeed a "substantial connection" between the records collected, prepared, maintained and used by the Sexual Harassment Office and the employment context. The Sexual Harassment Office is established pursuant to a Governing Council Policy that applies to all employees, among others. The Policy is referred to in collective agreements …and it is typically referred to in letters of appointment for faculty and for administrative staff. There is no question that every component of the Policy is related to employment insofar as employees of the University are concerned.
>
> Consistent with the fact that the University's Sexual Harassment Policy is central to employment obligations of employees, the Sexual Harassment Office functionally reports to the Vice-President Human Resources and Equity.
>
> A sexual harassment complaint brought against or brought by an employee is, by definition, an employment matter…
>
> The fact that the mediation process is confidential, and the records produced as part of it are confidential and remain within the Sexual Harassment Office, …does not change the characterization of the records themselves, which remain related to employment, in the case of those pertaining to employees. The *Act* grants an exemption based on the nature of the records, rather than which component of an institution holds them…
>
> Once the records are prepared, the University continues to have an "interest" in them. They form a binding commitment which, in the case of an employee, can result in a binding employment commitment. For example, if one of the records states that employee X will not contact employee or student Y, and if employee X does so, the breach of the commitment can give rise to discipline of employee X by the University. As was indicated by the Court in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* [(2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507], once the institution has an interest in the employment-related record, that interest continues permanently. It does not lose that interest simply because, in the University's situation, in some (but not all) cases, once the record of the mediation is finalized it may not be used again.

Analysis/Findings

The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective

bargaining relationship [Order PO-2157]. The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. The phrase "in which the institution has an interest" has been interpreted to mean more than a "mere curiosity or concern" and to refer to matters involving the institution's own workforce (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner*), supra).

I find that the records reflect the outcome of meetings or discussions about employment-related matters concerning the University's employees in which the University has an interest. Based on the nature of the records and on the representations of the University, I am satisfied that the University has established that it has an interest in these employment-related matters.

The matters giving rise to the records at issue in this appeal relate to the University's management of its own workforce and, thereby, engage its interest. In addition, the University's interest as an employer is clearly more than a mere curiosity or concern (see also Reconsideration Order PO-2096-R and Order PO-2106). Finally, as set out above and referred to in the University's representations, if section 65(6) applied at the time the records were collected, prepared, maintained or used (which is the case here), it does not cease to apply at a later date. Thus, the fact that the records may or may not be used again by the University does not negate its interest in these matters.

In the circumstances of this appeal, I am satisfied that the records at issue, which consist of documents concerning the resolution of sexual harassment complaints made against the University's employees, and contain terms concerning employment-related matters, satisfy the third part of the test under section 65(6)3.

Section 65(7): exceptions to section 65(6)

If the records fall within any of the exceptions in section 65(7), the *Act* applies to them. Section 65(7) states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The records are 45 one-page records of resolution relating to complaints involving faculty and/or staff. Each record reflects the mediated resolution of the sexual harassment issue concerning the University employee and another person. I conclude that none of the exceptions in section 65(7) apply to the records at issue. Therefore, I find that the University has established that section 65(6)3 applies to the 45 one-page records of resolution relating to complaints involving faculty and/or staff, and the *Act* does not apply to these records.

PERSONAL INFORMATION

I will now determine whether the second category of records, comprised of 45 one-page records of resolution not relating to complaints involving faculty and/or staff, contain "personal information". The term "personal information" is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations

The University submits that the records not relating to complaints involving faculty and/or staff contain personal information about "identifiable individuals". The University submits that the records cannot be effectively anonymized by the severance of the personal information, as to reliably render the information in them no longer personally identifiable. In particular, the University submits that:

> The records… contain the names of the complainant and the respondent, and the language of their agreed upon resolution may contain information relating to their University activities that would permit either direct identification of their identities, or a strong inference to be drawn regarding their identities. Thus, the records contain personal information about "identifiable individuals".

The appellant does not dispute that the records contain personal information of identifiable individuals, however, he submits that, as he wishes to have all the personal information severed or redacted from the responsive records, these anonymized records will not, therefore, contain any "personal information" and, therefore, will not be about "identifiable individuals". He

submits that given the large population of the University community, that it would not be possible to identify individuals from the unsevered information. In particular, he submits that:

> The University's assertion that the records cannot be effectively anonymized is …inconsistent with the practice of the University of Toronto's Sexual Harassment Office of publicly disclosing its Annual Reports on its website. According to the University of Toronto's decision letter dated October 20, 2006, the Annual Reports contain the following information:
>
> > The University's Annual Reports are specifically designed to provide the greatest degree of transparency possible in support of a confidential sexual harassment process that effectively protects the individual privacy of parties. The Reports contain detailed statistical breakdowns by type of complainant and respondent, nature of harassment and numerous other parameters designed to give a full and frank account of the University's discharge of its responsibilities respecting sexual harassment. Under "Nature Of Complaint" the University posts combinations of incomplete fact situations from several matters to illustrate the types of situations which give rise to sexual harassment matters, sufficiently altered, combined and edited to prevent even parties from identifying their own facts...
>
> It is inconceivable that [the records] cannot be anonymized so as to protect the identity of the parties - in the same way as the Annual Reports.

In reply, the University submits that:

> …even if personal identifiers are deleted there remains a risk that if the record were published the parties would be able to identify themselves; and that others will believe they can recognize the parties.
>
> With respect to the parties being able to identify themselves, the University concedes that this has not been a factor adopted in previous Commission decisions. But there is nothing in the statutory language to preclude it, and it makes sense to consider it in the present circumstances where one of the key purposes of the settlement that is recorded is to enable the parties to bring closure to the events and to move on; thus, whereas typically being able to identify oneself in a published record would not, alone, meet the test of being about an "identifiable individual", in the context of this particular kind of record personal identifiability is relevant and is permitted by the statutory language. [The *Act*'s] privacy protections are intended to support individuals' ability to control their own personal information. In this appeal, where confidentiality, closure and finality are key elements of the settlements contained in the records, individuals'

> loss of control through disclosure of the facts of the settlement undermines this purpose of the legislation. The language pertaining to protection of privacy should, as the Commissioner has repeatedly said, be given an expansive reading.
>
> …The statutory language uses the word "identifiable". The Court of Appeal has confirmed that the question is whether "there is a reasonable expectation that the individual can be identified from information": *Ontario (Attorney-General) v. Pascoe* [2002] O.J. No. 4300 (C.A.). Reasonableness must be assessed in the context of the University, which is frequently described as a "community", and where collegial and professional interactions between students, faculty and staff are promoted. The University is not one large amorphous corporate mass, but instead is a collection of smaller communities: the constituent colleges, the residences, departments, graduate units, etc, some of which are quite small and most of which are closely-knit. Within this context, there is a reasonable likelihood that someone who is part of that community and has even a partial knowledge of relevant facts or events will be able to infer accurately the identity of individuals from unique factual content in records of resolution. This is not merely a fanciful speculation, as changes in work, professional or study arrangements resulting from some settlements would necessarily come to the attention of others and could be added to other information to ascertain the identity of individuals…
>
> The Appellant suggests that the publication of material in the Sexual Harassment Office Annual Reports effectively means that the harm about which the University is concerned (if any) will happen anyway. This is not a correct characterization of the type of information that is presented in the Annual Reports, which is merely statistical information regarding the categories of complaint, and hypothetical information regarding the kinds of resolutions that are reached in settlements - very different from actual information regarding actual settlements, which is what would be disclosed if the appeal were successful. The information in the Sexual Harassment Office Annual Reports is not derived from a particular or specific sexual harassment matter.

Analysis/Findings

I agree with the University that the second category of records contain the "personal information" of the complainants and the respondents involved in each of the sexual harassment complaints. In particular, the personal information in the records includes the views or opinions of another individual about the individual (paragraph (g) of the definition of "personal information") and these individuals' names where they appear with other personal information relating to these individuals or where the disclosure of the names would reveal other personal information about the individuals (paragraph (h) of the definition).

Section 10(2) of the *Act* obliges the institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Pursuant to sections 10(2), 54(1) and 54(3) of the *Act*, I may order the disclosure of any portions of records which are not found to be subject to an exemption. However, based on my review of the records at issue, and taking into consideration that each record contains information concerning the background and resolution of individual complaints of sexual harassment, I find that the records cannot be anonymized to sever out the personal information in such a manner as to not reflect information concerning identifiable individuals.

I will now consider whether the mandatory exemption at section 21(1) applies to the information at issue.

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21.

In the circumstances, it appears that the only exception that could apply is section 21(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f).

Neither sections 21(3) or 21(4) apply to the information in the records. However, section 21(2) is applicable as it lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 21(1)(f) [Order P-239].

The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

The University relies on all of the factors in section 21(2), except for paragraphs (c) and (d), to support its argument that disclosure of the records at issue would be an unjustified invasion of

personal privacy under section 21(1)(f). The appellant disputes the University's arguments and also relies on paragraphs (a) to (c) of section 21(2). The relevant paragraphs of section 21(2) read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

I will address the application of each of the factors in section 21(2) separately.

21(2)(a): public scrutiny

The University submits that:

> Disclosure is not desirable in order to subject the activities of the Ontario Government or its agencies to public scrutiny. The University is not an agency of the provincial government. Moreover, the activities themselves, namely how two private individuals in a highly confidential mediated setting choose to resolve an

> emotionally charged and intensely private dispute are not relevant to the public interest in any way.

The appellant submits that:

> Disclosure is desirable for the purpose of subjecting the activities of the University of Toronto to public scrutiny. The University is a publicly funded institution charged with the care of young adults, most of whom are living away from home for the first time in their life. The sexual harassment office exists to deal with complaints of sexual harassment at the University. The public has a compelling interest in knowing about the nature of complaints that are being made and the resolutions that are resulting from these complaints. With this information, members of the public can make their determination as to whether the University is an environment in which young adults can learn free from harassment and can determine whether the University is properly dealing with complaints. To the extent that it does not believe that this is happening, then members of the public can demand change from the University. The public has a compelling interest in knowing, with as much detail as possible, the nature of the complaints that are being made and the frequency of their occurrence. For example, if it turns out that 45 of the 90 complaints relate to a particular type of "harassment", then the public can demand that specific action be taken to address this type of harassment. At a minimum, the public will know that this type of harassment is prevalent and be able to demand that the University provide an explanation as to why this is the case.

Analysis/Findings

As stated above, the University's Sexual Harassment Office Annual Reports contain:

> …detailed statistical breakdowns by type of complainant and respondent, nature of harassment and numerous other parameters designed to give a full and frank account of the University's discharge of its responsibilities respecting sexual harassment. Under "Nature Of Complaint" the University posts combinations of incomplete fact situations from several matters to illustrate the types of situations which give rise to sexual harassment matters, sufficiently altered, combined and edited to prevent even parties from identifying their own facts...

In my view, the University provides sufficient information in the Annual Reports of the Sexual Harassment Office to adequately address any concerns about the public scrutiny of the mediation of harassment complaints, without impacting on the privacy rights of the individuals mentioned in the records.

Therefore, I find that this factor does not apply to weigh in favour of disclosure of the records.

21(2)(b): public health and safety

The University submits that:

> Access would not promote public health and safety. Indeed, if anything, by undermining a process that is designed to deal with the consequences of alleged sexual harassment, access would be negative from a public health and safety perspective.

The appellant submits that:

> Disclosure would promote public health and safety. To the extent that there are serious acts of sexual harassment at the University of Toronto, members of the public can demand that changes be made to prevent such acts. The [accompanying the University's representations] show the harm caused by sexual harassment. To the extent that resolutions reached do not adequately protect the public from offenders, members of the public can demand changes so that future resolutions will more adequately protect the public. Resolutions that more effectively prevent harassment in the future promote public health and safety.

Analysis/Findings

Upon review of the records, I find that each record is unique to the parties and the circumstances giving rise to the harassment complaint. Therefore, in my view the disclosure of the individual mediated resolution of a harassment complaint would not promote public health and safety. I agree with the University that disclosure of the personal information in the records would diminish public health and safety by deterring future victims of sexual harassment from accessing the services of the University's Sexual Harassment Office, for fear of their personal information being publicly disclosed.

Therefore, I find that this factor does not weigh in favour of disclosure of the records.

21(2)(c): purchase of goods and services

The appellant submits that:

> Access to the information in the complaints will promote informed choice in the purchase of goods and services. For potential applicants to Universities, information about sexual harassment complaints made at the university and how these complaints are resolved would clearly be relevant to a decision as to which University in Ontario or Canada to attend.

Analysis/Findings

As stated above, I am of the view that the University has provided significant information about the details of the sexual harassment complaints at the University through the information provided in the Annual Reports of the Sexual Harassment Office. I find that it is unnecessary for the University to disclose the records, which contain the personal information of identifiable individuals, in order to assist prospective students to make an informed choice as to whether to attend the University.

Therefore, I find that this factor does not weigh in favour of disclosure of the records.

21(2)(e): pecuniary or other harm

The University relies on the supporting affidavits from a licensed psychologist and the University's Sexual Harassment Officer, both of whom have had extensive experience in the handling and resolution of sexual harassment complaints. The University submits that if the records are disclosed that:

> …even in anonymized form, there is a real risk of psychological harm. [The psychologist] states, … that "[d]isclosure of Sexual Harassment office records of informal resolution and mediation to a third party even in anonymized form is quite likely to expose both past and future complainants to heightened psychological distress and increased risk of psychological disturbances." … "reading the exact terms of their resolution is likely to initiate, within both complainants and respondents, an emotional and probably distressing reappraisal of the original decision to take part in the informal resolution and mediation process and to expose them to heightened risk of psychological disturbance for any or a combination of reasons."…
>
> In addition to the risk to past and future complainants and respondents, there is also a real risk of serious harm to others, namely those who will be dissuaded from filing a complaint as a result of increased concerns about loss of confidentiality. Sexual harassment is under-reported, and people are reluctant to come forward and make formal complaints. They require significant and repeated assurances of confidentiality before they are willing to come forward…
>
> If disclosure of the [records] were to occur, there is a very real risk of a significant "chilling effect". This chilling effect will mean that those who could be protected by accessing the formal sexual harassment complaint process will be less likely to be protected; they will be more likely to remain in a state of emotional distress and experience the physical symptoms which characterize many of those who feel they have been the victims of sexual harassment…

> [I]f members of the University community were able to identify the individuals it might complicate and negatively affect their freedom to pursue their studies and might negatively affect peer group relations.

The appellant submits that:

> As anonymized, the disclosure of the records cannot expose the parties to the complaint unfairly to pecuniary or other harm. The parties will not be identifiable.

Analysis/Findings

As I found above, the records cannot be anonymized to sever out the personal information in such a manner as to not include information that serves to identify individuals. I agree with the University that disclosure of the records will result in the individuals named in the records being exposed unfairly to harm. Therefore, I find that this factor does not weigh in favour of disclosure of the records, but weighs in favour of the non-disclosure of the records in order to protect the privacy of the individuals named in the records.

21(2)(f): highly sensitive

The University submits that:

> The information is highly sensitive. It details exactly how two people, in a highly confidential mediated setting have chosen to resolve an emotionally-charged and intensely personal dispute.

The appellant did not provide representations on this factor.

Analysis/Findings

I agree with the University that the personal information in the records is highly sensitive. Therefore, I find that this factor does not weigh in favour of disclosure of the records.

21(2)(g): inaccurate or unreliable

The University submits that:

> The information in records of resolution accurately reflects settlements arrived at by the parties, but is not "reliable" to others without the detailed context of the triggering events, of the mediation, and of the highly personal motivations of the parties. Without this personal detail, information in records of resolution is not "reliable" as it provides no understanding of settlements documented. Instead, they can be expected to provide an easily misunderstood or distorted and

> simplistic view of the last step in a complex process driven by unknown personal considerations. Such unreliability of the records is of particular concerns in the context of possible public exposure, in the media or otherwise.

The appellant submits that:

> The [records] represent the end of the complaint. It was framed by the parties to the complaint. It is the most accurate and reliable record of the outcome of the complaint.

Analysis/Findings

I agree with the University that the records on their face would not provide a complete picture of the circumstances giving rise to the complaint. The records contain the details of the mediated resolution of the complaint, without providing details of the circumstances that gave rise to the complaint. As such the personal information in the records does not represent an accurate or reliable account of the complaint in its entirety. Therefore, I find that this factor does not weigh in favour of disclosure of the records, but weighs in favour of the non-disclosure of the records in order to protect the privacy of the individuals named in the records.

21(2)(h): supplied in confidence

The University argues that the personal information in the records has been supplied to the Sexual Harassment Office in confidence by the parties to the complaint.

The appellant submits that:

> The personal information was supplied in confidence but this is not a relevant factor on this request. The personal information will have been redacted prior to the disclosure. Confidentiality is therefore preserved.

Analysis/Findings

The records consist of confidential mediated resolutions of complaints. As I found above, the records cannot be anonymized to sever out the personal information in such a manner as to not reflect information concerning identifiable individuals. Therefore, I find that this factor does not weigh in favour of disclosure of the records, but weighs in favour of the non-disclosure of the records in order to protect the privacy of the individuals named in the records.

21(2)(i): unfair damage to reputation

The University submits that:

> Disclosure may unfairly damage the reputation of any person referred to in the record. [S]exual harassment complaints are, by themselves, subject to stigma even if they have not been adjudicated and have been resolved in a confidential mediation. Thus, for example, a complainant, if identified, might be unfairly targeted; a respondent, if identified, might be unfairly presumed to have engaged in impropriety when there has been no adjudication of that issue, one way or another.

The appellant submits that:

> As anonymized, the disclosure of the records cannot expose the parties to the complaint unfairly to pecuniary or other harm. The parties will not be identifiable.

Analysis/Findings

As I found above, the records cannot be anonymized to sever out the personal information in such a manner as to not reflect information concerning identifiable individuals. Therefore, I find that this factor does not weigh in favour of disclosure of the records.

Conclusion

I find that none of the factors in section 21(2) weigh in favour of disclosure of the personal information in the records. I find that the records at issue contain the personal information of identifiable individuals and disclosure of these records constitutes an unjustified invasion of these individuals' personal privacy. Therefore, I find that 45 one-page records of resolution not relating to complaints involving faculty and/or staff are exempt from disclosure by reason of section 21(1) of the *Act*. As I have found the records to be exempt from disclosure by reason of the mandatory exemption in section 21(1), there is no need for me to consider whether they are also exempt from disclosure by reason of the discretionary exemption in section 20 of the *Act*.

PUBLIC INTEREST OVERRIDE

I will now consider whether there exists a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 21 exemption.

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Representations

The University submits that there is no basis for the application of the public interest override in section 23 to the personal information in the records. It states that:

> …the 45 records are Records of Resolution of a mediated resolution to an emotionally-charged, intensely private dispute in the context of the strongest possible guarantees of confidentiality… [T]he University publishes information in its Annual Reports about the types of resolution (generic) that are reached, and statistics regarding the number of complaints, their type, etc. Thus, scrutiny is permitted regarding matters that are relevant to the public interest; it is denied regarding matters that are completely irrelevant to the public interest. The University engages in the highest possible level of disclosure about the Sexual Harassment Office's activities while strongly protecting the privacy of participants...

The appellant relies on the submissions he made in support of his section 21(2)(a) argument, and also relies on Order P-1190, where the requester sought access to the most recent reports of peer evaluations of Ontario Hydro's five nuclear power plants. In that order former Assistant Commissioner Tom Mitchinson found that the public interest override applied as the public interest in nuclear safety and public accountability for the operation of nuclear facilities clearly outweighed the purpose of the exemption in that appeal.

The appellant also relies on the decision of former Commissioner Tom Wright in Order P-270. That appeal involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC). Commissioner Wright found that there was a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed.

The appellant submits that:

> …there is strong public interest in access to the responsive records. They relate to allegations of sexual harassment at one of Canada's largest and most prestigious universities and the resolution of those allegations. The University community is largely populated by young adults who are away from home for the first time. Sexual harassment can be one of the most traumatic experiences in their young life. The evidence filed by the University on this appeal demonstrates the harm caused by sexual harassment. Parents and members of the public have a compelling interest in knowing the nature of harassment that is occurring or allegedly occurring at the University and equally important, knowing that the University is taking appropriate steps to address incidents of harassment. Parents and members of the public must be able to satisfy themselves that the University is effectively preventing such harassment and taking appropriate action when such harassment occurs.
>
> The existence of the compelling public interest …is confirmed by the Sexual Harassment offices decision to prepare and distribute its Annual Report. The [records] merely represent the "raw materials" use to prepare the Annual Reports.

In reply, the University submits that:

> It is the University's submission that there is no compelling interest that has not been addressed in the Sexual Harassment Office's public reporting and in the publication of the Policy itself, and that the interests at issue in the settlements themselves are inherently private, rather than public. Further, the purpose of the exemptions in this matter, namely protection of privacy, health and safety, are clearly not outweighed by what interest there may be in disclosure.
>
> The University already discloses information that tells the public the kinds of complaints the sexual harassment office receives, the volume of such complaints, and the kinds of resolution that are reached. Thus, the public interest in subjecting the activities of a publicly-funded post-secondary institution to scrutiny is already served by the existing disclosure.
>
> To put the matter at its strongest, there is absolutely no public interest in knowing how, for example, two young students resolved an allegation of sexual harassment through mediation, especially when they specifically requested that it be private, when they were assured it would be private, when they had every expectation that it would remain private, and when they believed they could treat it as a closed chapter while they continued to move forward with their studies and personal development. Indeed, the public interest is overwhelmingly in support of the University's position.

Analysis/Findings

Upon review of the records and the representations of the parties, I find that there is no compelling public interest in disclosure of the records at issue. As stated above in my discussion of the factor in section 21(2)(a), I find that the University has provided sufficient information in the Annual Reports of the Sexual Harassment Office to subject the mediation process involving harassment complaints to public scrutiny, without impacting on the privacy rights of the individuals mentioned in the records.

I do not agree that the situation in this appeal is analogous to those in the cases relied upon by the appellant. These cases concern records related to the oversight of issues around the generation of nuclear energy. As Commissioner Wright stated in Order P-270: "In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous".

I find that a significant amount of information has already been disclosed in the Annual Reports of the Sexual Harassment Office and, in my view, this is adequate to address any public interest considerations [Orders P-532, P-568].

Even if I were to find that a compelling public interest does exist in the circumstances of this case, I would find that the public interest in the information in the records at issue does not clearly outweigh the purpose of the section 21(1) exemption. In my view, the appellant has not demonstrated that any public interest in making this information publicly available clearly outweighs the need to protect the personal privacy rights of the individuals who entered into a mediated resolution of an intensely private matter between them.

ORDER:

I uphold the University's decision to not disclose the records.

Original signed by: September 21, 2007
Diane Smith
Adjudicator